CF0000063073

(2)

Division Bench (Criminal)

BEFORE THE HIGH COURT OF JUDICATURE AT JABALPUR

Cr. Appeal No. 1213 of 1999

Appellants (In Jail) :

1- Sahan Sai, son of Salik Singh aged about 55 years, Occupation- Cultivation.

2- Smt. Dharam Kuwer W/o Sahan Sai aged about 52 years, occupation- Housewife.

3- Kundan Singh son of Sahan Sai aged about 22 years, Occupation- Cultivation.

4- Krishna Prasad son of Sahan Sai aged about 25 years, Occupation- Cultivation.

All resident of village Chhindkali P.S. Ambikapur, Distt. Surguja (MP)

Versus

Respondent : State of M.P.
Through Station House Officer
Police Station Ambikapur, District- Surguja (MP)

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE

Conviction Sentence

(5673)

filed on 28/4/99
by Shri R. Pandey Advocate
No. A 2

Received Petition With Annexures
2814
CLERK
O/o. Advocate General
M. P. JABALPUR

(42)

DIVISION BENCH: HON'BLE SHRI VIJAY KUMAR SHRIVASTAVA, J & HON'BLE SHRI DHIRENDRA MISHRA, J

CRIMINAL APPEAL NO. 1213 of 1999

Appellant : Sahan Sai & three Others

Vs.

Respondent : State of Madhya Pradesh

Shri Shrawan Chandel, learned counsel for the appellants.
Shri D.K.Gwalre, learned Deputy G.A. for the respondent/State.

JUDGMENT
(10.05.2006)

Dhirendra Mishra, J

By this appeal under Section 374(2) of the Criminal Procedure Code, the accused/appellants have questioned the legality, propriety and correctness of the judgment of conviction and order of sentence dated 08.03.99 passed by learned Additional Sessions Judge, Ambikapur in S.T. No. 282/93 whereby the learned Additional Sessions Judge after holding the accused/appellant guilty for causing the death of one Vijay Bahadur Singh convicted them under Sections 148 and 302/149 of the IPC and sentenced to undergo rigorous imprisonment for three years and imprisonment for life. However, during pendency of this appeal, appellant No.1 Sahan Sai died in jail while undergoing the sentence and the appeal preferred by him has been abated as per order dated 23.02.2006 of this Court in Cr. A. No. 1213/99.

2. Case of the prosecution, in brief, is that the accused/appellants and one juvenile offender namely Nandan Singh formed unlawful assembly on 10.03.93 at about 7.00 p.m. and assaulted deceased Vijay Bahadur Singh with a common object of causing his death by axe and club. As per allegations in the charge sheet, the juvenile offender Nandan Singh broke the leg of goat belonging to deceased Vijay Bahadur Singh whereupon a quarrel ensued on account of this, as a result of which the accused

persons came armed with *tabbal*, axe and club and started assaulting Vijay Bahadur Singh. Accused/appellant Dharam Kunwar was exhorting the other accused persons. Deceased Vijay Bahadur Singh fell down in the field and cried for help. Prithvi Pal Singh (P.W.-5), son of the deceased and Jaimuniya Bai (P.W.-1) wife of the deceased rushed to the spot and brought Vijay Bahadur Singh. They found both the legs and left hand of Vijay Bahadur broken. He had also sustained injuries over other parts of his body. He was taken to Ambikapur hospital where he died. In the meanwhile, on 11.03.93, at about 10.00 a.m., P.W.-3 Sakhanand Singh lodged the report in the police station Ambikapur vide Ex.P-1 on the basis of which Crime No. 250/93 under Section 302/34 of the IPC was registered against the accused/appellants. The doctor of the Government Hospital, Ambikapur examined Vijay Bahadur and looking to the multiple injuries referred him to Medical College, Raipur. In the intervening night of 10-11/03/93, Vijay Bahadur died on the way. On the basis of the information given by the Ward boy, merg No. 43/93 was registered under Ex. P-18. The report by the doctor to the S.H.O. Ambikapur regarding death of Vijay Bahdaur is Ex.P-14 and P-15. After registering the crime, the Investigating Officer proceeded to the scene of occurrence, prepared inquest Ex.P-3 of the dead body of deceased Vijay Bahadur after due notice to the witnesses in their presence. Thereafter body of the deceased was sent for autopsy to District Hospital Ambikapur vide Ex. P-16 where Dr. J. K. Bhootani (P.W.-7) conducted the post mortem on the body of Vijay Bahadur on 11.03.93 and submitted his report under Ex. P-17. On the memorandum of appellant No.1 Sahan Sai (Ex.P-4) a blood stained axe and dhoti was seized. Similarly, on the basis of memorandum of accused/appellants Krishna and Kundan (Ex.P-5, P-6 and P-10) blood stained club and lungi were taken into possession and on the memorandum of accused/appellant Nandan Singh, one club was taken into possession and on the basis of memorandum of Ex.P-9, one blood stained lungi, shirt and club was seized from the possession of accused/appellant Krishna. Blood stained soil and plain soil from the place of occurrence were taken into possession vide seizure memo of Ex.P-13. Site plan of Ex.P-20 was prepared. The seized articles were sent to FSL,

Raipur for examination and the Chemical Examiner, FSL, Raipur vide his report dated 16.08.93 (Ex.P-21) opined that Article – A, soil seized from the spot, article-D dhoti seized from accused/appellant Sahan Sai, article E & F Lungi seized from accused/appellant Krishna, article H seized from accused/appellant Kundan Singh and article Full pant of deceased Vijay Kumar contained human blood. The above articles were again sent to the Serologist for confirmation of the origin of blood and the Serologist vide his report of Ex.P-23 opined that the earth and dhoti seized from accused/appellant Sahan Sai and the full pant of the deceased contained human blood. However, the blood group of the stains cannot be determined. After completion of the investigation, charge sheet was filed in the Court of Judicial Magistrate First Class, Ambikapur who in turn committed the case to the Sessions Judge, Ambikapur from where the learned Additional Sessions Judge, Ambikapur received the case on transfer for trial.

3. Charges under Section 147,148 and 302/149 of the IPC were framed against all the accused/appellants. A separate charge sheet was filed against juvenile offender Nandan Singh in the Juvenile Court. However, the appellants abjured their guilt.

4. The prosecution in order to establish the charge against the accused/appellants examined as many as nine witnesses. Statement of the accused persons was also recorded under Section 313 of the Cr.P.C. in which they denied the prosecution evidence appearing against them and pleaded innocence and stated that they have been falsely implicated in the crime.

5. Learned trial Court after hearing the counsel for the parties convicted and sentenced the accused/appellants as mentioned above.

6. Homicidal death of Vijay Bahadur Singh is not in dispute. Even otherwise, from the statement of P.W.-7 Dr. J.K. Bhootani, who conducted the post mortem over the person of the deceased submitted his report Ex.P-17 in which he found bony deformity of forearm, left leg and left feet. He has

also found incised wound over the left parietal region, left knee, left and right leg, right knee and ankle. He has also noticed incised wound in the size of 3x1cm. over left leg, incised wound in the size of 15 x 6 x 3 cm. on the left foot, incised wound in the size of 10 x 3 x 1 cm. over the right leg and on the basis of this he has opined that the cause of death was due to shock as a result of the injuries mentioned above and the death was homicidal in nature.

7. The conviction of the accused/appellants is based on the statements of P.W.-1 Jaimuniya Bai, wife of the deceased and P.W.-5 Prithvi Pal Singh, son of the deceased who claim to have seen the incident.

8. Learned counsel for the accused/appellants submit that the name of appellant No.2 Dharam Kunwar does not figure in the First Information Report as the report was lodged by P.W.-3 Sakhanand Singh on the basis of information given by P.W.-1 Jaimuniya Bai who claims herself to be the eye witness of the incident and therefore omission of the name of accused/appellant Dharam Kunwar in the First Information Report throws a serious doubt on the veracity of the report itself.

9. Relying upon the judgment of the Apex Court in the case of ***Matadin Vs. State of Maharastra*** reported in ***SC 1998 (Vol.6) 58*** it is argued that merely on the basis of alleged exhortation by Dharam Kunwar the appellants cannot be held guilty under Section 302/149 of the IPC. It is further argued that according to the case of prosecution, accused/appellant No.1 was holding axe whereas accused/appellants 3 & 4 were holding only club. Referring to the statement of P.W.-7 Dr. J.K. Bhootani, it is submitted that all the injuries present over the person of the deceased were caused by sharp edged weapon and therefore from the statement of this witness, it is clear that appellant No. 2, 3 & 4 did not participate in actual assault and therefore they could not have been convicted under Section 302 of the IPC.

10. Further referring to paragraph 14 of the statement of P.W.-1 Jaimuniya Bai it is argued that she is not an eye witness as she herself admitted that when her husband returned from the market, the darkness has already set and therefore, she could not see as to which accused/appellant assaulted her husband in what manner and she could also not see as to who was holding what weapon. It is further argued that the lady claims to have witnessed from a distance of 75 meters in paragraph nine of her deposition and therefore, the evidence given by these witnesses could not be believed because after sun set, at about 7.00 p.m. it is not possible to see from a distance of 75 mtrs. Referring to the statement of the eye witness P.W.-5 in paragraph seven, it is argued that the account given by this eye witness is in variance with the account given by his mother. Another eye witness has claimed that he saw the incident from a distance of 12-15 paces. It is argued that both the alleged eye witnesses are close relatives of the deceased and as such they are highly interested witnesses and their statement should be closely scrutinized. In paragraph seven, he has stated that 75-80 axe blows and club blows were inflicted over the deceased but there are no corresponding injuries over the person of the deceased and as such he has exaggerated the accounts of the incident.

11. On the other hand learned counsel for the State supports the judgment of the trial Court and submits that though it is true that the doctor has not stated in his deposition that there were injuries which are caused by hard and blunt object but looking to the nature of the injuries over the person of the deceased, the possibility of assault by club cannot be ruled out. It is submitted that where there is a variance in the eye witness, account of the incident and the report given by the doctor regarding the injuries present over the person of the injured, the eye witnesses account cannot be de-emphasized only on the opinion given by the doctor.

12. We have heard learned counsel for the parties. We have also perused the record and the evidence examined by the prosecution and the judgment of the trial Court. The only question for decision of this appeal is whether the

prosecution has been able to establish the involvement of appellant No.2 to 4 in the instant case with the help of reliable and cogent evidence.

13. P.W.-1 Jaimuniya Bai, wife of the deceased has been examined by the prosecution as the eye witness. She has stated that on the date of incident when she was cleaning utensils and her husband was preparing to go to school, she heard the bleating of the goat whereupon she came out and saw that Nandan was sitting near the goat and was beating the goat and the goat was bleating. At this, she asked Nandan that what had he done to the goat? On this, Nandan replied that the goat had entered into the *Baari* and therefore he was beating and one of the leg was broken. On the same day, in the evening at 5.00 p.m. her husband returned from the school and she narrated to her husband about the incident that Nandan Singh had beaten the goat. Thereafter her husband went out of the house at 7.00 p.m. to the market, at that time her neighbourers Sahan Sai, his wife, his son and Nandan were abusing her husband. After some time she heard her husband shouting that "I am coming, I am coming" and thereafter when she came out of her house she saw that all the five accused persons were assaulting her husband along with one other person whom she could not identify. They were assaulting with axe and club. Accused/appellants Krishna & Sahan Sai were carrying axe whereas others were assaulting with club and stones and the mother of accused Nandan was exhorting them to break his legs. At this, her husband fell on the ground. She cried and the villagers gathered there. Her husband sustained injuries on both his hands and his left leg was cut. She also described several injuries that were caused to her husband. He was taken to the Government Hospital, Ambikapur and the doctor referred him to Bhilai. However, he died on the way.

14. In paragraph nine of her cross examination she has stated that the distance of her house from the place of incident is approximately 75 mtrs. However, apart from other omissions as pointed out in her diary statement of Ex.D-1 as pointed out in paragraph 12, 13 & 14 she has also stated that when her husband returned from the market it was already dark and

therefore she could not see as to what weapons the accused persons were carrying or in what manner the accused persons assaulted her husband.

15. P.W.-5 Prithvi Pal Singh, son of the deceased has stated that on 10.03.93 at about 5.00 p.m. he was in the house of his uncle, Suraj Main Singh which is 200 paces away from his home. He came to his house after hearing the cries of his mother and found that the accused persons namely Sahan Sai, Krishna, Kundan, Dharam Kunwar and Nandan were assaulting his father. He stated that Sahan Sai was assaulting with axe and Krishna, Kundan and Nandan were assaulting with club and accused Dharam Kunwar was exhorting them to beat his father and thereafter number of villagers came there and the accused person fled from there.

16. In the cross examination, he has admitted that in his diary statement he has stated that his father returned from the market at about 7.00 p.m. In paragraph four, he has admitted that in the nearby electric pole which is 30 paces from the place of incident, there was no bulb and no light was coming from the street light. He has further stated that he does not know as to why his father had gone near the house of the accused persons. In paragraph seven he has admitted that in the month of March darkness sets in at 7.00 p.m. He further stated that he did not give the statement marked as A to A of Ex. D-3 and how it is written, is not known to him. On scrutiny of the statement of these two witnesses, we find that P.W.-1 has stated that Krishna and Sahan Sai were carrying axe and others were assaulting her husband with club and P.W.-5 has stated that only Sahan Sai was carrying axe and other appellants were assaulting with club. P.W.-1 in paragraph 14 of her statement has admitted that she could not see the incident because of darkness and therefore she was not in a position as to in what manner the accused persons assaulted her husband or what weapons they were carrying whereas this witness has stated that 75-80 blows of axe and club were given to his father. The most significant aspect of this case is that P.W.-7 Dr. J. K. Bhootani who conducted the post mortem on the body of deceased Vijay Bahadur Singh has categorically stated in paragraph six of his statement that all the injuries

caused to the deceased were caused by sharp edged weapon. Except the above two alleged eye witnesses, no other independent eye witness present at the time of incident was examined. Thus, if we look to the statement of these witnesses and the statement of the doctor we are unable to accept the version of P.W.-1 and P.W.-5. So far as it relates to the assault by the appellants No. 3 & 4, as per the case of prosecution these two accused persons were carrying club. However, as per the opinion of the doctor (P.W.-7) there were no injuries present over the person of the deceased which were caused by hard and blunt object. Therefore, apart from contradictory description with respect to the weapon of offence which the appellants were carrying, in the statement of these witnesses their account has also not corroborated in material particulars with the statement of P.W.-7, who has stated that no corresponding injuries as per assault attributed by these appellants No. 2, 3 & 4 have been found on the person of the deceased. From the evidence available on record, it is evident that the incident took place near the house of the appellants and the deceased went to the house of the appellants and there is no evidence on record that the appellants constituted an unlawful assembly with a common object to commit the offence of committing the death of deceased Vijay Bahadur Singh and the finding in this regard of the Court below is without any foundation.

17. On the basis of the aforesaid discussion, we are of the considered opinion that the learned Additional Sessions Judge, Ambikapur ought to have extended the benefit of doubt to the appellants No. 2, 3 & 4 as the prosecution has failed to establish the charges against the above appellants by adducing reliable and trustworthy evidence.

18. In the result, the appeal preferred by the accused/appellants No. 2,3 &4 succeeds. The conviction and sentence awarded under sections 148, 302 read with section 149 of the IPC are set aside. Since the accused/appellants No.2, 3 & 4 are already on bail, their bail bonds shall stand discharged and they be released forthwith if not required in any other case.

Sd/-
V.K.Shrivastava
Judge

Sd/-
DHIRENDRA MISHRA
Judge